

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7466

Investigation into Petition Filed by Vermont Department)
of Public Service Re: Energy Efficiency Utility Structure)

Order entered: 8/19/2009

ORDER RE MOTION TO STRIKE TESTIMONY

I. INTRODUCTION

In this Docket, the Vermont Public Service Board ("Board") is considering a change in the structure of Vermont's Energy Efficiency Utility ("EEU"). The Conservation Law Foundation ("CLF") has filed an objection to testimony filed by Associated Industries of Vermont ("AIV") and testimony filed by International Business Machines Corporation ("IBM"). In this Order, we deny CLF's motion to strike the testimony of AIV and IBM.

II. PROCEDURAL HISTORY

On June 26, 2009, AIV, IBM, CLF, Central Vermont Public Service Corporation, the City of Burlington Electric Department, the Vermont Department of Public Service, Green Mountain Power Corporation, the Group of Municipal Electric Utilities¹, Vermont Electric Power Company, Inc., and Vermont Energy Investment Corporation filed direct testimony in this docket.

On July 10, 2009, CLF filed an objection and a motion to strike the testimony of AIV and IBM. On July 24, 2009, AIV and IBM separately filed memoranda in opposition to CLF's motion to strike their testimony.

1. The Group of Municipal Electric Utilities include: Barton Village Inc. Electric Department; Village of Enosburg Falls Water & Light Department; Town of Hardwick Electric Department; Village of Hyde Park Electric Department; Village of Jacksonville Electric Company; Village of Johnson Water & Light Department; Village of Ludlow Electric Light Department; Village of Lyndonville Electric Department; Village of Morrisville Water & Light Department; Village of Northfield Electric Department; Village of Orleans Electric Department; Town of Readsboro Electric Light Department; and Swanton Village Inc. Electric Department.

III. PARTIES' POSITIONS

CLF objects to and moves to strike the direct testimony of William Driscoll on behalf of AIV and the direct testimony and exhibits of Jonathan A. Aldrich on behalf of IBM. In support of this motion, CLF asserts that the testimonies of Mr. Driscoll and Mr. Aldrich: (1) fail to demonstrate the witnesses' personal knowledge of the facts to which they testify and therefore fail to meet the requirements of V.R.E. 602; (2) are not based on personal knowledge and are inadmissible as lay opinion testimony under V.R.E. 701; and (3) present no foundation to qualify either witness as an expert and allow admission of their opinion testimony under V.R.E. 702.

With respect to V.R.E. 602, CLF maintains that Mr. Driscoll's testimony fails to demonstrate any personal knowledge on energy efficiency in general or the structure for delivering energy efficiency service and that Mr. Aldrich's testimony fails to demonstrate personal knowledge of legal argument or opinion regarding the EEU structural models. With regard to V.R.E. 701, CLF contends that Mr. Aldrich's and Mr. Driscoll's testimony present opinion evidence that strays far beyond the facts of which they have demonstrated personal knowledge, and as a result, their testimony adds nothing to the Board's deliberative or investigatory process.² Finally, as for V.R.E. 702, CLF asserts that neither AIV nor IBM have provided evidence that their witnesses are qualified experts to offer testimony regarding the delivery of energy efficiency services on the utility scale and the structure of energy efficiency delivery services.

In its response to CLF's motion to strike testimony, AIV contends that the issues in this docket are "less questions of fact and law than of policy judgment," and that it is reasonable and appropriate for the Board to allow the testimony of both AIV and IBM. In addition, AIV claims that should CLF's arguments prevail, the resulting precedent could drastically curtail the ability of parties to provide meaningful and necessary input on policy questions before the Board in the future.

AIV maintains that it is qualified to offer policy judgment and related arguments, in that it represents businesses and business sectors directly impacted by the policy issues at stake in this

2. CLF cites *State v. Lapham*, 135 Vt. 393, 402, 377 A.2d 249 (1977) (lay opinion not based on personal knowledge "adds nothing" to a jury's deliberative process and is inadmissible).

docket, and one of its primary purposes is to provide opinion and advocacy on such policy issues. AIV contends that its witness, Mr. Driscoll, has appropriate expertise in that he has served for nearly eight years as AIV's vice president, has represented AIV in the workshop process leading up to this docket and this docket itself, and has been extensively involved in Board dockets and legislative debate and action related to EEU policies generally and the structure of rules and statutes governing the EEU specifically.

IBM requests that the Board deny CLF's motion. IBM contends that Mr. Aldrich's testimony is relevant and material, because it addresses the specific issues identified in the Order Opening Investigation in this docket and the Department of Public Service's draft recommendation for a new EEU structure. In addition, IBM asserts that it is significantly affected by the cost of the EEU and that its view of the proposal to change the EEU structure is important to facilitate the development of the record in this proceeding.

With regard to the expertise of its witness, IBM cites V.R.E. 702, Board precedent, and court precedent and contends that it is within the Board's discretion to determine whether Mr. Aldrich possesses the requisite qualifications to submit testimony and that such qualifications may arise from training, experience and/or education.³ In support of Mr. Aldrich's expertise, IBM recites his qualifications, including employment for the past six years as the Site Energy Program Manager at IBM Vermont, active participation in this proceeding, attendance at workshops leading to this proceeding, and active participation in the discussions held by the various parties regarding the disputed issues in this proceeding. In response to CLF's arguments under V.R.E. 602 and 701, IBM contends that Mr. Aldrich is a qualified expert witness, not a lay witness, and his testimony clearly demonstrates personal knowledge of the facts about which he is testifying, given that his experience has enabled him to become familiar with the law regarding the EEU structure.

3. IBM cites Docket No. 6545, Order of February 21, 2002; *State v. Hicks*, 148 Vt. 459, 461 (1987); and *In Re D.C.*, 163 Vt. 517, 522 (1995).

IV. DISCUSSION AND CONCLUSION

Pursuant to 3 V.S.A. § 810(1), in contested-case proceedings we generally follow the rules of evidence as applied by the superior courts in civil cases. The statute further provides that, "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."⁴

The Vermont Rules of Evidence provide that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Thus, as the Board found in Docket No. 6545, as an administrative tribunal the Board has broad discretion as to the admissibility of all evidence, including expert testimony. The definition of "expert," *i.e.*, a person who can contribute expert testimony, is broad. Under the Vermont Rules of Evidence, moreover, an expert may be qualified on the basis of her skill, knowledge, or experience. Where a witness' experience or training is sufficient to provide assistance to the Board, that witness' testimony is admissible as expert testimony, whether it be in the form of opinion or otherwise.⁵

In the September 11, 2008, Order opening this docket, the Board identified issues to be resolved in this proceeding. Those issues include whether a change in the EEU structure is warranted, and if so, whether changing the structure to an "Order of Appointment" model would promote the general good of the state. The Board also identified issues that would address the details of a possible new EEU structure.

In its motion to strike testimony, CLF asserts that the testimony of Mr. Aldrich and of Mr. Driscoll is not admissible as expert witness testimony. We disagree. Both Mr. Aldrich and Mr. Driscoll have gained relevant knowledge and expertise through their participation in EEU-related processes. Mr. Aldrich's and Mr. Driscoll's participation, as well as that of the other parties, has been helpful in identifying issues for the Board's consideration in this proceeding.

4. 3 V.S.A. § 810(1).

5. Docket 6545, Order of Motion to Strike, 3/21/02, at 2.

We conclude that Mr. Driscoll and Mr. Aldrich each possess sufficient knowledge and expertise to address the issues set forth in their testimonies. The extent of their expertise will affect the weight that the Board places on their testimony, as is the case with any witness offering expert opinions.

Because we have concluded that Mr. Driscoll and Mr. Aldrich qualify as experts, their testimony is prohibited by neither V.R.E. 602 nor 701. V.R.E. 602, by express reference to V.R.E. 703, permits expert testimony that is not based on personal knowledge. V.R.E. 701 limits opinion testimony only by lay witnesses, not by expert witnesses.

For these reasons, we deny CLF's motion to strike.

SO ORDERED.

Dated at Montpelier, Vermont, this 19th day of August, 2009.

<u>s/James Volz</u>)	
)	
)	PUBLIC SERVICE
<u>s/David C. Coen</u>)	
)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: August 19, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)